IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBIN DOUGLAS HYLTON, Appellant.	No. 37825-6-II UNPUBLISHED OPINION

Van Deren, C.J. — Robin Douglas Hylton appeals his conviction for bail jumping,[1] arguing that prosecutorial misconduct denied him a fair trial. In his Statement of Additional Grounds for Review (SAG),[2] he also claims that the trial court abused its discretion by refusing to give proposed instructions on the defense of uncontrollable circumstances. Finally, he contends that the State tampered with the jury and engaged in vindictive and selective prosecution. We affirm.

FACTS

On November 28, 2007, Hylton was scheduled to appear in superior court on a defense motion to dismiss. This was one of many hearings that he was required to attend following his

[1] RCW 9A.76.170.

[2] RAP 10.10.

release on bail for a third degree child rape charge. On this occasion, Hylton, who resided in California, had traveled back to California and did not attend the hearing.[3] Discovering that Hylton was absent, the trial court signed a bench warrant for his arrest. Hylton appeared at the next hearing and was arrested.

The State charged Hylton with bail jumping. At trial, Hylton represented himself with standby counsel. During closing argument, the State explained the reasonable doubt standard as follows:

> Instruction number two talks about what reasonable doubt is. Reasonable doubt is one for which a reason exists, and may arise from the evidence, or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person, after fully, fairly, and carefully considering all of the evidence, or lack of evidence. If after such consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.
>
> Some of you may remember voir dire on Monday[;] we talked about the fact that a doubt doesn't necessarily equal a reasonable doubt, not the same thing. So basically [the instruction] tells you *if you think something happened, if you believe it happened, it's beyond a reasonable doubt*. If after you [sic] . . . So a doubt is not a reasonable doubt. *So, if in your mind it's reasonable to think that something happened, you're convinced beyond a reasonable doubt*.

Report of Proceedings (RP)[4] at 83-84 (some alterations in original) (emphasis added). The defense did not object to this argument.

The jury convicted Hylton as charged. Hylton appeals.

ANALYSIS

I. Prosecutorial Misconduct

Hylton contends that the State's explanation of reasonable doubt constituted prosecutorial

[3] Hylton spoke regularly with his attorney on the child rape charge, but his attorney could not remember whether he had reminded Hylton of the court appearance on November 28, 2007.

[4] All references to the report of proceedings relate to the transcript of May 15, 2008.

misconduct and denied him a fair trial. While the State concedes that the prosecutor misstated the reasonable doubt standard, it argues that the remarks were not so flagrant, ill-intentioned, or incurably prejudicial as to require reversal. We agree.

A. Standard of Review

The Sixth Amendment[5] guarantees defendants a fair trial, not an error-free trial. *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). To establish prosecutorial misconduct, Hylton must show that the prosecutor's comments were improper and prejudicial. *See Fisher*, 165 Wn.2d at 747. "[P]rejudice" means "a substantial likelihood [that] the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). We review the State's comments during closing argument in the context of the total argument. *See Fisher*, 165 Wn.2d at 747.

But, as here, the defendant's failure to object to an improper comment constitutes waiver unless it was "'so flagrant and ill-intentioned that it evince[d] an enduring and resulting prejudice' incurable by a jury instruction." *Fisher*, 165 Wn.2d at 747 (internal quotation marks omitted) (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

B. Not Flagrant or Ill-Intentioned

Hylton claims that the prosecutor's misstatement of reasonable doubt, a well-established rule, was flagrant and ill-intentioned. We disagree.

In *State v. Warren*, the prosecutor repeatedly made the following argument to the jury during closing argument: "'But reasonable doubt does not mean beyond all doubt and it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt.'"

[5] U.S. Const. amend. VI.

165 Wn.2d 17, 24-25, 195 P.3d 940 (2008) (quoting *Warren* RP (Feb. 20, 2003) at 104-105), *cert. denied*, 129 S. Ct. 2007 (2009). Unlike Hylton, the defendant objected to these arguments. The trial court overruled the objections, gave a lengthy curative instruction, and directed the jury to review the written instructions. *Warren*, 165 Wn.2d at 24-25.

On appeal, the defendant argued that the remarks amounted to prosecutorial misconduct requiring reversal but our Supreme Court disagreed. *Warren*, 165 Wn.2d at 23, 28. While the repeated comments were improper and flagrant, the court held that the trial court's prompt instructions remedied any prejudice. *Warren*, 165 Wn.2d at 26-28.

A prosecutor's comments can also be flagrant and ill-intentioned when they liken the defendant's organization to well-known terrorist groups or refer to three dismissed rape counts while implying that the victim's out-of-court statements supported those dismissed counts. *See State v. Belgarde*, 110 Wn.2d 504, 508-09, 755 P.2d 174 (1988); *State v. Boehning*, 127 Wn. App. 511, 519-23, 111 P.3d 899 (2005).

But unlike the preceding examples, the State's comments here were neither flagrant nor ill-intentioned. After giving the correct standard, the prosecutor appears to have unintentionally misstated the explanation of reasonable doubt. This is especially evident given how the prosecutor seemed to lose his train of thought, stopping mid-sentence and starting again. And despite Hylton's allegation that the State sought unfair advantage over Hylton, who was representing himself, the record does not support this conclusion.

C. Not Incurably Prejudicial

Hylton also argues that no timely instruction could have cured the resulting prejudice arising from the prosecutor's comments because the State's restatement of the correct reasonable

doubt standard twisted its language and further confused an already confusing standard. We disagree.

The *Warren* court held that even the prosecutor's flagrant remarks "undermin[ing] the presumption of innocence" were cured by the trial court's instructions. 165 Wn.2d at 26. Likewise, the prosecutor's comparatively innocuous remarks here did not cause *incurable* prejudice. Although Hylton contends that the remarks here were more egregious than those in *Warren* because the prosecutor here "used the language of the reasonable doubt instruction but inverted its meaning," the prosecutor in *Warren* used the phrase "'benefit of the doubt,'" and we see no meaningful distinction between these two misstatements of the reasonable doubt standard. Br. of Appellant at 10; 165 Wn.2d at 24-25 (quoting *Warren* RP (Feb. 20, 2003) at 104-105).

Second, the jury was instructed on the correct reasonable doubt standard several times and we presume that a jury follows the trial court's instructions. *State v. Trout*, 125 Wn. App. 403, 420, 105 P.3d 69 (2005). During this one-day trial, the trial court twice read aloud the reasonable doubt standard and twice directed the jury to disregard any lawyers' remarks that conflicted with the trial court's statement of the law. Jury members also received the written jury instructions to take into deliberations.

Third, Hylton's failure to object to the prosecutor's statements strongly suggested that they "did not appear critically prejudicial . . . in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). And we hold Hylton to the same standard as an attorney. *See State v. Vermillion*, 112 Wn. App. 844, 858, 51 P.3d 188 (2002). Therefore, the remarks here were not flagrant, ill-intentioned, or incurably prejudicial. Accordingly, we hold that Hylton waived this issue for appellate review and his claim fails.

II. Statement of Additional Grounds For Review Issues

A. Refusal to Give Affirmative Defense Instruction

Hylton seems to argue that the trial court abused its discretion by refusing to give his proposed instruction on uncontrollable circumstances preventing his appearance in court, based on his claim that his attorney failed to remind him to attend the hearing. His attorney testified that he could not remember whether he reminded Hylton of that particular hearing.

1. Standard of Review

Where the trial court's refusal to give a proposed jury instruction is based on a legal issue, we review the matter de novo; where refusal is based on factual issues, we review for abuse of discretion. *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007).

2. Uncontrollable Circumstances

A defendant is entitled to jury instructions allowing him to argue his case theory if sufficient evidence supports the proposed instruction. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); *State v. Locati*, 111 Wn. App. 222, 225, 43 P.3d 1288 (2002). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). But "'[i]f any element of a defense is missing, the defense should not be presented to the jury in the instructions.'" *State v. Chase*, 134 Wn. App. 792, 803, 142 P.3d 630 (2006) (quoting *State v. Bell*, 60 Wn. App. 561, 566, 805 P.2d 815 (1991)).

"Uncontrollable circumstances" include

> an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an

> automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

Former RCW 9A.76.010(4) (2001); RCW 9A.76.170(2). The record on review does not reveal that Hylton argued or provided any evidence supporting the trial court's giving an uncontrollable circumstances instruction.[6] Thus, we hold that the trial court did not abuse its discretion.

B. Issues Based on Facts Outside the Record

Next, Hylton contends that the State tampered with the jury because "[t]he prosecutor[']s opening remarks at voir d[i]r[e] indicated having previous contact and a sense of familiarity with the jury." SAG at 2. He also claims to be a victim of prosecutorial vindictiveness because "[t]he second hearing [he] missed (for which [he] was not charged) was set by the prosecutor without proper notification" and "[t]he day after the hearing [t]he Riverside County Sheriffs" arrested him. SAG at 1-2. And Hylton apparently argues that the State engaged in selective prosecution because "[t]he prosecutor[']s office does not prosecute most bail jumps." SAG at 2. But facts relating to these allegations and issues are all outside the record and we do not consider such claims in a direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

[6] And to the extent that Hylton claims that being out of state during the hearing was an uncontrollable circumstance, this instruction is still unwarranted because he cannot have "contribute[d] to the creation of such circumstance[] in reckless disregard of the requirement to appear." RCW 9A.76.170(2).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Quinn-Brintnall, J.